

information not included in the Company's direct testimony or raised by Mr. Lander in his prefiled testimony.³

II. ARGUMENT

A. DEP's motion to strike portions of Gregory Lander's surrebuttal testimony was untimely.

The Company stated that it had no opportunity to file a motion to strike in advance of the hearing because (1) Commission regulations require that motions be filed at least ten days prior to a hearing, and surrebuttal testimony was filed only one week before the hearing, on June 2nd; and (2) the hearing format and the appearance of witnesses was not decided until June 3rd.⁴ While the Company could not file a motion to strike ten days before the hearing, that does not mean that it could not have done so at some point during the full week between the filing of the surrebuttal testimony and the hearing date. And the fact that DEP did not know whether witnesses would appear at the virtual hearing is irrelevant to the question of the admissibility of Mr. Lander's surrebuttal testimony. Even if witnesses did not appear at the hearing, Mr. Lander's surrebuttal testimony would have been entered into the record as if it were given orally from the stand. Hence, the Company offers no reasonable defense for its untimely motion.

B. Even if the motion were timely, it has no substantive basis, and the Commission should deny it.

- i. The Company misstates the legal standard governing the proper scope of surrebuttal testimony.

³ Tr. at 15.16–16.12.

⁴ Tr. at 9.23–10.4.

To support its motion, the Company claims that “the regulations and laws applicable in this State allow a party to address in surrebuttal testimony *only that which was addressed directly in rebuttal testimony*, and that it’s not an opportunity for a party to present supplemental direct testimony.”⁵ This is both a misstatement and misapplication of the South Carolina law on the proper scope of reply testimony.

A party is not prohibited from pointing out, in reply testimony, portions of direct testimony that were not addressed in rebuttal. South Carolina law provides that testimony should not raise *new arguments or issues* that a party should have included in its case in chief.⁶ Any argument a party raises in its direct testimony is part of its case in chief and thus is not “novel” or “supplemental.” Further, the law does not require that surrebuttal be limited only to those issues raised in *rebuttal testimony*; rather, surrebuttal may be offered to rebut any evidence offered by the opposing party during a given *proceeding*.⁷

Indeed, the standard that the Company proposes here would have profound procedural implications for the Commission. For every surrebuttal filing, the Commission could be asked to parse each argument word-by-word and compare it line-by-line to the preceding rebuttal testimony, and then have to make a challenging factual determination about the appropriate scope of each argument and response. And here, that effort would ultimately serve no purpose at all, as the evidence sought to be stricken would still be in the record as part of the surrebuttal witness’ initial direct testimony. A far simpler standard—and the one supported by South Carolina law—is that a party may not raise

⁵ Tr. at 9.18–9.22 (emphasis added).

⁶ *Daniel v. Tower Trucking Co.*, 32 S.E.2d 5, 10 (S.C. 1944) (a party may offer reply testimony “provided it is in the nature of true reply and not such as should have been offered in the case in chief. The latter may also be allowed, but only in the discretion of the Court.”).

⁷ *State v. Farrow*, 504 S.E.2d 131, 134 (S.C. App. 1998).

new issues or arguments in surrebuttal. Pointing out that the rebutting party failed to address or rebut parts of the witness' initial direct testimony is not the same thing.

- ii. The contested portions of Mr. Lander's surrebuttal testimony were in response to Mr. McClay's rebuttal testimony and also raised in Mr. Lander's direct testimony.

Even assuming the Company's overly stringent standard applied, the portions of Mr. Lander's surrebuttal testimony that the Company seeks to exclude were in reply to Mr. McClay's rebuttal testimony, making them appropriate instances of surrebuttal.

a. Short-Term Capacity Utilization

The Company moved to strike the portion of Mr. Lander's surrebuttal testimony where he notes that the Company did not provide an alternate assessment of its short-term capacity utilization and states why that calculation is important to his overall assessment of the Company's utilization and the sufficiency of its firm capacity.⁸ This testimony was directly in response to Mr. McClay's rebuttal testimony; Mr. McClay stated that he did not believe Mr. Lander's conclusions about the Companies' firm transportation utilization and short-term utilization to be accurate, and he also disputed Mr. Lander's analysis regarding the sufficiency of the Company's firm capacity.⁹ Mr. Lander's testimony was simply stating that, as regards short-term utilization, the Company provided no alternative calculation to dispute this key part of his analysis. Mr. Lander discussed the relevance of short-term capacity utilization at length in his direct testimony.¹⁰

⁸ Tr. at 9.3–9.22; Lander Surrebuttal Test. at 2.5–2.19.

⁹ McClay Rebuttal Test. at 10.14 –12.3.

¹⁰ Lander Direct Test. at 8.13–11.5.

b. Distinguishing Hourly Burn/Flows by Type of Generator and Generating Station

The Company also seeks to exclude the portion of Mr. Lander’s surrebuttal testimony where he testifies about the need for distinguishing hourly burns and flows by unit type.¹¹ This issue too was raised by Mr. Lander in his direct testimony and disputed in Mr. McClay’s rebuttal testimony.¹² Mr. McClay stated that he did not “agree with Mr. Lander’s recommendations that the Commission require the utilities in future fuel cases to collect and provide for each generation unit the hourly generation (MWh), the unit type, and the type and quantity of fuel consumed by hour.”¹³ Because this issue was raised in Mr. Lander’s direct testimony, and disputed by Mr. McClay in rebuttal, it was fair game for surrebuttal.

C. The Commission should grant SACE/CCL’s motion to strike portions of Mr. McClay’s rebuttal testimony that raise novel issues not previously raised by SACE/CCL.

On page 7, lines 12 –15 of his rebuttal testimony, Mr. McClay states that the Companies’ existing firm capacity allows them to procure lower cost natural gas supply from Transco Zones 3 and 4 and transport it to Transco Zone 5 for delivery to the Carolinas’ generation fleet. This portion of the testimony is not relevant to any of Mr. Lander’s direct testimony; Mr. Lander did not raise any arguments related to the pricing differences between Transco supply zones. The Company’s inclusion of this testimony appears in keeping with one of Mr. McClay’s stated purposes for his testimony: “to provide *additional* background on the management of natural gas supply and

¹¹ Tr. at 14.20–15.10; Lander Surrebuttal Test. at 3.12–4.13.

¹² Lander Direct Test. at 17.11–18.23.

¹³ McClay Rebuttal Test. at 17.17–18.1.

transportation capacity on behalf of DEP and [Duke Energy Carolinas].”¹⁴ But providing additional, i.e., new information in rebuttal is precisely what South Carolina law proscribes. Mr. McClay should have limited his testimony to the second stated purpose, which was to “respond to testimony and recommendations offered by Mr. Gregory Lander”¹⁵ Because Mr. McClay’s testimony about pricing in Transco zones strays beyond that scope, it should be stricken.

D. The issues raised by Mr. Lander related to testimony deadlines, discovery, and data consistency were appropriately addressed in testimony.

Finally, SACE/CCL disagree that Mr. Lander’s recommendations regarding discovery deadlines and problems with the data produced by the Companies are not appropriate for expert testimony. As to the question of discovery timing, expert witnesses are competent to testify as to any discovery or timing issues that make forming their testimony difficult or impossible. And Mr. Lander’s testimony on data availability and consistency is not simply for his own purposes. Rather, Mr. Lander recommends that the Company be required to track this data because of its relevance to decisions the Commission must make in this or future fuel cases. It was in part due to Mr. Lander’s recommendations that the Commission ordered Duke Energy Carolinas to track more granular hourly data in the fuel proceeding last year. Having now reviewed that data, Mr. Lander simply made suggestions to improve its usefulness to the Commission.

The Commission, appropriately, remains interested in obtaining useful data. As Commissioner Whitfield stated at the hearing, “this Commission has ordered the data from last year and more transparency and smaller time increments ... we, as a

¹⁴ *Id.* at 4.9–4.11 (emphasis added).

¹⁵ *Id.*

Commission, of course, always want to be as transparent as we can.”¹⁶ The Company, on the other hand, appears to have little interest in transparency here. The Company provided more granular information, but claims that it cannot be used to make recommendations or draw conclusions affecting customer rates; Mr. Lander thus made recommendations to make the data more useful, but now the Company opposes them.¹⁷ Meanwhile, the Company does not hesitate to make their own data-driven assertions, such as “we’re deficient in firm capacity ... and we don’t have extra to release.”¹⁸ This amounts to little more than “trust us; we know what’s best.”

The Commission was right last year to order more granular data, partly in response to Mr. Lander’s recommendations. At the hearing, the DEP pledged to continue improving its dashboard tool, a position at odds with their efforts to strike Mr. Lander’s recommendations. Mr. Lander’s testimony should stand, and the Commission should adopt his recommendations for improving the data, all of which will serve the Commission’s stated interest in transparency.

III. CONCLUSION

The Company’s motion to strike portions of Mr. Lander’s testimony is based on an incorrect statement of South Carolina law and should be denied. However, a portion of Mr. McClay’s rebuttal testimony does go beyond what South Carolina allows by providing supplemental information; as such it should be stricken. Finally, Mr. Lander’s recommendations related to data consistency and availability were appropriate and should remain in the record.

¹⁶ Tr. at 87.1–87.7.

¹⁷ At no point during this proceeding has the Company contended that Mr. Lander’s recommendations on data tracking are infeasible.

¹⁸ Tr. at 83.15–83.18.

Respectfully submitted,

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